BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, INC. EXELON CORPORATION, PEPCO HOLDINGS, INC. PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC, AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *DEL. C.* §§ 215 AND 1016 (FILED JUNE 18, 2014)	))))))))	PSC DOCKET NO. 14-193

PUBLIC SERVICE COMMISSION STAFF'S MOTION TO
COMPEL PRODUCTION OF DISCOVERY RESPONSES

The Public Service Commission Staff ("Staff"), by and through its undersigned counsel, hereby moves the Hearing Examiner to compel the answer and production of discovery responses from Delmarva Power & Light Company ("Delmarva"), Pepco Holdings, Inc. ("PHI"), Exelon Corporation ("Exelon"), Exelon Energy Delivery Company, LLC ("Exelon"), Purple Acquisition Corporation ("Merger Sub"), and Special Purpose Entity, LLC ("SPE") (collectively, the "Joint Applicants") which Staff served on the Joint Applicants on July 31, 2014. In support of its Motion, Staff provides the following:

Background

1. On June 18, 2014, the Joint Applicants filed an application ("Application") with the Commission seeking approval, under 26 *Del. C.* §§ 215 and 1016, of a proposed merger and a change of control of Delmarva to be effectuated by the Merger of PHI with Merger Sub, a wholly-owned subsidiary of Exelon.

2. To complete the transaction, Exelon will pay $6.8 billion in cash to purchase all of the issued and outstanding publicly-held common shares of PHI and then merge PHI with and

into Merger Sub (the "Merger"). PHI will be the surviving corporation and will become an indirect, wholly-owned subsidiary of Exelon. Specifically, PHI will become the subsidiary of SPE. Upon completion of the Merger, PHI's subsidiaries will operate as part of Exelon's holding company system. In addition, on or about the effective date of the Merger, PHI will be converted from a corporation into a limited liability company as part of the entire transaction.

3. As part of the Application, the Joint Applicants requested approval of a proposed procedural schedule as part of Proposed Order No. 8581. The Joint Applicants represented that if the proposed procedural schedule were to be approved by the Commission, they would waive the 120-day deadline established in 26 *Del. C.* §1016.

4. On July 8, 2014, the Commission approved Order No. 8581 which included the procedural schedule for this docket. Order No. 8581 also deferred the completion of a public evidentiary hearing on this docket and designated Senior Hearing Examiner Mark Lawrence to conduct public comment sessions and evidentiary hearings on this matter.

5. On July 30, 2014, the Senior Hearing Examiner held a mandatory conferencing schedule, and the parties involved in this case agreed upon a few revisions to the procedural schedule (the "Revised Schedule") that this Commission approved via Order No. 8581. Among other things the Revised Schedule established: (1) a deadline by which Staff had to serve initial discovery on the Joint Applicants (July 31, 2014); (2) the date for the filing of any objections to such discovery (seven days after receipt of discovery); (3) the deadlines for any motions to compel (August 15, 2014); and (4) the date when the Senior Hearing Examiner would rule upon any such motions (on or before noon on August 22, 2014).

6. Staff timely served its initial discovery on the Joint Applicants on July 31, 2014. On August 7, 2014, the Joint Applicants sent initial written objections to three of Staff's

discovery questions. Generally speaking, the Joint Applicants' objections are based upon (i) the attorney-client privilege and common interest doctrine; (ii) an undisclosed, vague reference to a non-disclosure exception under the federal Freedom of Information Act ("FOIA"); and (iii) a vague, alleged right to confidentiality related to the materials of an unrelated non-party to this proceeding.[1] Following Staff's response to the objections and request for a privilege log, the Joint Applicants provided a log listing certain withheld documents on the afternoon of Wednesday, August 13, 2014.

<u>Argument</u>

I. The Joint Applicants' Objections on the Basis of Attorney-Client Privilege and the Common Interest Doctrine Are Unsupported By Their Deficient Privilege Log, and <u>Should Be Rejected.</u>

7. The Joint Applicants' objection to PSC-FN-18—seeking "all communications between Exelon and PHI concerning potential ring fencing measures"—is inadequate on a number of levels. The objection asserts that it is made "on the grounds of attorney-client privilege (common interest doctrine). All communications concerning ring fencing between Exelon and PHI were between counsel for the Joint Applicants or counsel and their clients." Neither this explanation nor the Joint Applicants' privilege log are sufficient to satisfy their burden of establishing that the documents sought are, in fact, privileged.

A. The Attorney-Client Privilege

8. A party asserting that documents or communications are protected by the attorney-client privilege bears the burden of establishing the existence of the privilege. *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992); *Deutsch v. Cogan*, 580 A.2d 100, 107 (Del. Ch. 1990). To do so, the party must show that each communication (1) was made between privileged persons, (2) for the purpose of seeking, obtaining or delivering legal advice, and (3) was intended to be

[1] For the Joint Applicants' specific objections see Exh. "A" attached.

confidential.[2] *Moyer*, 602 A.2d at 72. Disclosure of the communication to a third party generally constitutes a waiver of the privilege. *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *7 (Del. Super. Feb. 12, 2009). Moreover, the attorney-client privilege protects only communications, not underlying facts. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2009 WL 2031793, at *2 (Del. Ch. July 10, 2009); *State v. Grossberg*, 1998 WL 117975, at *4 (Del. Super. Jan. 23, 1998).

9. The attorney-client privilege protects only legal advice—not business or personal advice. *MPEG LA L.L.C. v. Dell Global B.V.*, 2013 WL 6628782, at *2 (Del. Ch. Dec. 9, 2013); *Lee v. Engle*, 1995 WL 761222, at *1 (Del. Ch. Dec. 15, 1995). Where a communication contains both business and legal advice, it "must be produced with the legal-related portions redacted" so long as doing so is reasonably practicable. *MPEG*, 2013 WL 6628782, at *2; *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 5103266, at *1 (Del. Ch. Dec. 4, 2009). And where business and legal advice are inseparable the communication will be considered privileged only if the primary purpose of the communication is legal advice. *MPEG*, 2013 WL 6628782, at *2; *SICPA Hldgs., S.A. v. Optical Coating Lab., Inc.*, 1996 WL 636161, at *6 (Del. Ch. Oct. 10, 1996).

B. The Joint Applicants' Privilege Log is Inadequate and Should Be Disregarded.

10. Parties withholding documents are subject to stringent requirements in that they must produce privilege logs detailing the documents and the claimed grounds. Logs must identify: "(1) the date of each communication; (2) the parties to the communication, including

[2] The third element requires that the party claiming the privilege demonstrate that the circumstances surrounding the communication indicate that they "'reasonably expect[ed]' confidentiality." *Rembrandt Techs.*, 2009 WL 402332, at *5 (quoting *Moyer*, 602 A.2d at 72). Under the Delaware Rules of Evidence, a communication is considered confidential when disclosure to third parties is not intended, "other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." D.R.E. 502(a)(2).

both names and [corporate] positions; (3) the attorneys involved; and [(4)] the subject matter of each communique sufficient to show why the privilege is warranted, as well as whether it pertains to the decision or decisions in question, including facts to bring each document within the narrow reach of the privilege." *Dep't of Transp. v. Figg Bridge*, 79 A.3d 259, 266 (Del. Super. 2013); *Klig v. Deloitte LLP*, 2010 WL 3489735, at *5 (Del. Ch. Sept 7, 2010). A privilege log must set forth "a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality." *Deutsch*, 580 A.2d at 107 (quotation omitted).[3]

11. Here, the privilege log provided by the Joint Applicants is inadequate on a number of levels, and fails to satisfy their burden of demonstrating that the withheld documents are privileged and protected from disclosure. First, many of the descriptions provided for withheld documents fall well short of the required showing. Examples of inadequate descriptions include, among others:

Confidential e-mail communication between counsel client representative providing legal advice regarding merger
Confidential e-mail between client representatives and counsel forwarding legal advice regarding Delaware application for merger approval
Confidential e-mail communication between client representatives and counsel seeking and obtaining legal advice regarding a ring-fencing proposal
Confidential email between client representatives and counsel providing legal advice regarding Carim Khouzami

12. The only substantive information provided in these descriptions is the last few words. The rest is repeated information that is provided elsewhere in the log. Delaware courts have routinely rejected such inadequate descriptions, as they fail to "provide sufficient

[3] "Just as you can't hit what you can't see, you can't challenge what the other side hasn't described." *Klig*, 2010 WL 3489735, at *6.

information to enable [Staff] to assess the privilege claim and decide whether to mount a challenge." *Klig*, 2010 WL 3489735, at *6.

13. Moreover, the descriptions of many of the documents are largely slightly varied duplications of one another. For example, approximately one-third of the entries are described only as "regarding testimony of [individual]." Another one-third of the entries are described as regarding "ring-fencing proposal," "ring-fencing commitments," or "Ring Fencing Provisions in Delaware Application." This prevents Staff from distinguishing any of the 30 documents from one another, making any challenge to specific documents impossible. *See Id.* at *2-3 (admonishing this approach and ordering production of all withheld documents).

14. Even from the log's sparse descriptions, however, it is evident that documents are being improperly withheld and should be produced. Most notable is an email from an Exelon non-attorney to individuals from Exelon and PHI. (Log No. 52) The log describes the email as "Confidential email between client representatives and counsel requesting legal advice regarding Carim Khouzami testimony." However, the only attorney on the email is in-house counsel <u>for PHI</u>. Even an expansive interpretation of the attorney-client privilege cannot operate to protect such communications.

15. Another improperly withheld document is a report by nonparty The Liberty Consulting Group <u>from 2003</u>. (Log No. 88) The report, which was attached to an email from a PHI non-attorney to counsel for both PHI and Exelon, is described as being "provided for the purpose of obtaining attorney legal advice regarding ACE participation in the PHI pool." The mere fact that the report was provided for the purpose of obtaining legal advice does not shield it from production. "If emails are privileged, but the attachments to the emails do not independently earn that protection, then the attachments may not be withheld . . . ." *AM Gen.*

Hldgs. LLC v. Renco Grp., Inc., 2013 WL 1668627, at *3 (Del. Ch. Apr. 18, 2013). Accordingly, the report should be produced.

16. Yet another attachment whose allegedly privileged status is not demonstrated by the log is described as "Credit Ratings for PHI and Subsidiaries," and was sent from a PHI non-attorney to counsel for both PHI and Exelon. (Log No. 84) Credit ratings are inherently non-legal, and the Joint Applicants have provided no support to the contrary here. Thus, the document must be produced.[4]

17. Finally, many more of the log's descriptions—such as the dozens "regarding ring-fencing"—reference matters that are intrinsically factual and include nothing aside from the presence of counsel to indicate they include legal rather than commercial advice, yet are withheld in their entirety. As a practical matter, it would be impossible for **<u>all</u>** of the communications between Exelon and PHI regarding ring fencing measures to be requests for, and the rendering of, legal advice. If this were the case, no substantive discussion on the topic of ring fencing would have ever transpired between the parties. The Joint Applicants, however, do not contend that to be the case. To the extent such documents and communications do, in fact, contain privileged material, the document should have been produced with the legal-related portions redacted. *See, e.g.*, *MPEG*, 2013 WL 6628782, at *2 (so holding); *AM Gen. Hldgs.*, 2013 WL 1668627, at *2 n.8 (same).

18. Additionally, while the log indicates attorneys and non-attorneys, it makes no effort to provide individuals' corporate positions, a fact which is particularly essential to evaluating whether a communication is likely to contain business versus legal advice. Indeed, Delaware courts have noted that "[i]f a company's employee, who served as both a business and

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[4] Moreover, no author is listed for this document, nor is one listed for another attachment that is described vaguely as "Confidential attached chart reflecting attorney legal advice regarding merger."

legal advisor, was a party to a communication regarding a business matter instead of a legal matter, the attorney-client privilege would not protect that communication." *PharmAthene*, 2009 WL 2031793, at *2 (holding that counsel who also acted as the chief negotiator was acting primarily in a business capacity); *see also KLM v. Checchi*, 1997 WL 525861, at *1 (Del. Ch. July 23, 1997) (finding that in-house attorney "served as much as a business advisor as a legal advisor and that [his] response to questions were communicated in a business capacity and not in a legal setting"). And notwithstanding the Joint Applicants' failure to provide corporate positions, at least two of the individuals identified as Exelon attorneys—and included on dozens of withheld communications—also hold other non-legal roles within the company: Darryl Bradford (Senior Vice President) and Bruce Wilson (Senior Vice President and Corporate Secretary).[5]

19. In conclusion, the Joint Applicants have failed to meet their burden of establishing that the withheld documents are subject to the attorney-client privilege. This conclusion is bolstered by their inability to produce an adequate and substantive log supporting their privilege claims. Accordingly, the Joint Applicants' privilege assertions should be rejected.[6]

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[5] The failure to provide individuals' positions or roles is also significant in light of the requirement that communications must be intended as confidential to retain their privilege. Indeed, in the corporate context, "[t]he 'privilege is waived if the communications are disclosed to employees who did not need access to' them." *WebXchange Inc. v. Dell Inc*., 264 F.R.D. 123, 176 (D. Del. 2010). Where non-attorney individuals appear on communications, the Joint Applicants merely described them as "client representatives"—a term that does not even indicate whether they are, in fact, employed by the respective company as opposed to serving in a consulting or other role that would mean they were situated outside the "circle of confidentiality."

[6] Courts' remedies when faced with inadequate privilege logs have varied. However, the Court of Chancery has recently ordered blanket production of all withheld material, stating that it is a "'terrible idea' to reward that type of conduct with a do-over." *See Klig*, 2010 WL 3489735, at *7, a copy of which is attached as Exh. "B".

C. The Common Interest Doctrine Offers No Protection for the Withheld Documents.

20. The Joint Applicants' objection also cites the "mutual" or "common interest doctrine," which permits "separately represented clients sharing a common legal interest" to communicate with one another regarding that shared interest. *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 WL 532100, at *4 (Del. Super. Feb. 2, 2011); *Rembrandt Techs.*, 2009 WL 402332, at *8. Under Delaware law, the common interest doctrine is not an independent privilege; rather, it acts as a limited exception to waiver of the attorney-client privilege for materials that are otherwise privileged. *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004). Application of the doctrine is appropriate only "where it is clear that the parties were collaborating and sharing information in furtherance of a joint *legal* strategy or objective . . . [and] courts have typically denied the privilege where it appears that the interests involved are primarily commercial in nature, or where the shared legal advice primarily pertains to advancing the common commercial interest." *Titan*, 2011 WL 532100, at *4.

21. The Joint Applicants' common interest objection rings hollow for several reasons. As an initial matter, the Joint Applicants have failed to make the threshold showing that the withheld documents are protected by the attorney-client privilege for the reasons set forth above. Absent this showing, the common interest doctrine fails as a matter of law. *See Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *2 (Del. Ch. Oct. 12, 2012).

22. Second, the Agreement and Plan of Merger was not entered into until April 29, 2014. Until that date—at the earliest—PHI and Exelon were merely arms-length counterparties negotiating a business transaction. However, twelve entries on the privilege log <u>predate</u> the Merger Agreement, and all were circulated to individuals from both PHI and Exelon. The common doctrine offers no protection for these communications.

23. The situation is analogous to that in *Titan*, where the Court of Chancery found that communications by or with counsel and shared with others prior to the parties' entry into a common interest agreement were not privileged. *See Titan*, 2011 WL 53201, at *3. The Court noted that the "interaction between [the parties] was far from an established clearly articulated business arrangement, observing that "[e]ach had separate counsel which was being used to protect their interests, not only in how the [proposed] transaction would be structured but the business relationship between [the parties]." *Id.*

24. Further, the Joint Applicants have asserted no facts—in their privilege log or otherwise—demonstrating that the withheld communications were exchanged in furtherance of a joint legal strategy or objective. To the contrary, the log's limited descriptions refer to "ring fencing," "the merger," and "merger commitments," indicating that their communications were designed primarily, if not entirely, to advance a commercial transaction (*i.e.*, the merger). Under these circumstances, courts have refused to permit parties to utilize the common interest privilege. *See, e.g.*, *Glassman*, 2012 WL 4859125, at *3 (rejecting common interest doctrine where privilege log described communications as regarding "Purchase and Sale Transaction" and "purchase of interest in company"); *Titan*, 2011 WL 53201, at *5 (rejecting argument that parties "shared a common legal interest in receiving legal advice on the issues concerning the transaction"); *Corning*, 223 F.R.D. at 190 (rejecting assertion of common interest doctrine because company's communications were made to persuade one party to invest in the other rather than to formulate joint defense); *Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) ("It is of no moment that the parties may have been developing a business deal that included as a component the desire to avoid litigation.").

25. As the parties asserting the privilege, the Joint Applicants bear the burden of proving that the material in question is, in fact, privileged. They have failed to do so, and they must therefore produce the withheld documents.

II. 15 U.S.C. §18a(h) Does Not Apply to a Non-Governmental Filing Party in a State Administrative Proceeding, and the Joint Applicants' Refusal to Disclose the Filing is Therefore Inappropriate.

26. The Joint Applicants' objection to PSC-FN-58 erroneously suggests that 15 U.S.C. §18a(h)[7] somehow prohibits the Joint Applicants from disclosing to Staff a copy of the complete, unredacted filing they made with the Federal Trade Commission ("FTC"). On the contrary, §18a(h) prevents the federal government and its agencies (such as the FTC) from disclosing to outside parties any materials filed pursuant to the Hart-Scott-Rodino Act (18 U.S.C. §18a). *See Mattox v. F.T.C.*, 752 F.2d 116, 120 (5th Cir. 1985) (Civil Investigation Demand materials may not be disclosed to persons outside the Federal Government without the consent of the provider); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 571 (1983) (CID materials may not be disclosed to persons outside the federal government without the consent of the provider). The Congressional intent behind §18a(h)'s exemption for premerger data filed with the Federal Government was to prevent mandatory disclosure under FOIA. Congress did not want the government to be forced to disclose such information to the public and did not want government agencies to have the discretion to release premerger data to anyone except, for example, in an "administrative . . . action or proceeding." 122 Cong. Rec. 30877 (1976) (emphasis added). Here, Staff is not requesting the FTC or any other federal agency to release the filing made with the FTC. Instead, Staff has requested that the Joint Applicants produce it. Hence, 15 U.S.C.

[7] Section 7A(h) of the Hart-Scott-Rodino Act, 15 U.S.C. §18a(h), provides as follows: "Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress." (Emphasis added).

§18a(h) does not prohibit the Joint Applicants from providing Staff with a complete unredacted copy of such filing.[8]

III. The Joint Applicants Have Failed to Explain Why They Should Not Produce Documents Related to PSEG's Testimony in the New Jersey Case, Particularly in Light of Staff's Willingness to Agree to a Confidentiality Stipulation.

27. In PSC-PA-187, Staff requested production of "a copy of the confidential version of all testimony and exhibits addressing merger savings (including the cost-benefit analysis) that was sponsored by Exelon and/or PSEG witnesses in the proposed merger proceedings before the New Jersey BPU in Docket No. EM05020106." The Joint Applicants objected to this request "on the grounds that the material is confidential to a third party that is not a party to this proceeding. None of the Joint Applicants may waive the right to confidentiality of PSEG." This objection is not based on any state or federal privilege or articulated confidentiality agreement, but rather on a vague and unspecified explanation that PSEG's documents must retain confidentiality. Without specifying the grounds for the confidentiality asserted, the Joint Applicants cannot demonstrate a reason for any confidentiality to be maintained, let alone why disclosure should be denied here. *See Ali v. Kasprenski*, 2009 WL 2948044, at *2 (D. Del. Sept. 14, 2009) (requiring party to submit explanation specifying the grounds for claim that report was confidential under state law).[9]

28. Moreover, nothing prevents the Joint Applicants from requesting that Staff maintain the confidentiality of these third-party documents. Indeed, Staff has already entered

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[8] It is Staff's understanding that in Exelon's 2011 acquisition of Constellation, both Constellation and Exelon provided unredacted versions of their respective HSR filings to the Maryland Public Service Commission without objection. Furthermore, during the discovery phase of the 2011 proceeding, Exelon/Constellation referenced the HSR filing dozens of times when responding to Staff and Intervenor data requests. Thus, Applicants' subsequent offer to redact only the bidder information is unacceptable to Staff as there exists no applicable exception when the party producing the documents is <u>not</u> the government. *See* Exh. "C" attached.

[9] Even in the Joint Applicants' recent email—in which they purport to be in the process of obtaining limited requested documents and contacting PSEG concerning other documents—they offer no explanation as to the grounds underlying their objection. *See* Exh. C.

into a confidentiality agreement in connection with this matter, and the Joint Applicants have failed to articulate any reason why this agreement is insufficient to protect against confidentiality concerns relating to disclosure of the documents sought here. Nor have they requested that Staff enter into any other confidentiality agreement in connection with obtaining copies of the PSEG testimony and exhibits. Accordingly, the Joint Applicants' objection must fail.[10]

WHEREFORE, for the reasons set forth above, Staff requests that the Hearing Examiner grant its Motion to Compel the Production of Discovery Responses to PSC-FN-18, PSC-FN-58, and PSC-PI-158, and require the Joint Applicants to produce the withheld documents, or, at a minimum, submit them for an *in camera* review.

Dated: August 15, 2014

Respectfully submitted:

/s/ James McC. Geddes

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[10] To the extent this information from PSEG is not made available to Staff, all correspondence and logs of telephone calls attempting to produce such information should be produced.

EXHIBIT A

JOINT APPLICANTS
DELAWARE PSC 14-193
OBJECTIONS TO PSC STAFF INITIAL REQUEST FOR PRODUCTION
AND INTERROGATORIES
REQUEST NO. 18

QUESTION NO. 18

PSC-FN-18 Ring Fencing

Please provide all communications between Exelon and PHI concerning potential ring fencing measures.

RESPONSE:

A. The Joint Applicants object to this request on the grounds of attorney/client privilege (mutual interest doctrine). All communications concerning ring fencing between Exelon and PHI were between counsel for the Joint Applicants or counsel and their clients.

SPONSOR:

JOINT APPLICANTS
DELAWARE PSC 14-193
OBJECTIONS TO PSC STAFF INITIAL REQUEST FOR PRODUCTION
AND INTERROGATORIES
REQUEST NO. 58

QUESTION NO. 58

PSC-FN-58 Corporate Governance

Please provide the Hart-Scott-Rodino filings of PHI and Exelon once available.

RESPONSE:

A. The Joint Applicants object to this request on the grounds that the requested material is protected from disclosure pursuant to 15 *U.S.C.* § 18a (h).

SPONSOR:

JOINT APPLICANTS
DELAWARE PSC 14-193
OBJECTIONS TO PSC STAFF INITIAL REQUEST FOR PRODUCTION AND INTERROGATORIES

REQUEST NO. 187

QUESTION NO. 187

PSC-PI-187 Merger Savings and Allocations

Please produce a copy of the confidential version of all testimony and exhibits addressing merger savings (including the cost-benefit analysis) that was sponsored by Exelon and/or PSEG witnesses in the proposed merger proceedings before the New Jersey BPU in Docket No. EM05020106.

RESPONSE:

A. The Joint Applicants object to this request on the grounds that the material is confidential to a third party that is not a party to this proceeding. None of the Joint Applicants may waive the right to confidentiality of PSEG.

SPONSOR:

EXHIBIT B

2010 WL 3489735
Only the Westlaw citation
is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Steven E. KLIG, Plaintiff,
v.
DELOITTE LLP, Deloitte Tax LLP and Deloitte & Touche LLP, each a Delaware Limited Liability Partnership, Defendants.

C.A. No. 4993-VCL. | Submitted: Aug. 16, 2010. | Decided: Sept. 7, 2010.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

LASTER, Vice Chancellor.

***1** In a bench ruling and implementing order dated August 6, 2010, I directed the defendants to produce documents listed on their privilege log (the "Discovery Ruling"). The defendants ask me to certify the Discovery Ruling for interlocutory appeal. Only the Delaware Supreme Court can determine whether to accept an interlocutory appeal. Nevertheless, Supreme Court Rule 42 tasks this Court with initially assessing whether interlocutory review is warranted. Guided by the language of Rule 42 and a consistent line of Supreme Court precedent rejecting interlocutory appeals from discovery rulings, I conclude that certification is not appropriate.

The defendants also ask for a stay of the Discovery Ruling pending the outcome of an appeal. Either this Court or the Delaware Supreme Court can grant a stay. Applying the factors set forth in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*, 741 A.2d 356, 357-58 (Del.1998), I conclude that a stay is not warranted.

I previously stayed the effectiveness of the Discovery Ruling pending the issuance of this decision. Recognizing that it is within the discretion of the Delaware Supreme Court to view either the certification or the stay issue differently, the temporary stay shall remain in place for an additional 20 calendar days to facilitate appellate review. During that time, the defendants can pursue a further stay with the Delaware Supreme Court.

I. FACTUAL BACKGROUND

The underlying claims in this case concern efforts by plaintiff Steven E. Klig to return to active practice as a tax advisor with defendants Deloitte LLP, Deloitte Tax LLP, and Deloitte & Touche LLP (collectively, "Deloitte"). In January 2009, the FBI arrested Klig and charged him with multiple felonies. The salacious details of the charges generated significant media coverage. Deloitte and Klig agreed that he would take a voluntary, paid leave of absence.

In September 2009, with his legal problems still unresolved, Klig sought to return to active employment and resume his counseling practice. Deloitte senior management rejected Klig's proposal and determined that he would remain on leave. Because Klig was still a partner, Deloitte continued to pay him his seven-figure compensation.

Klig responded by filing this action. He primarily contends that the Deloitte executives who placed him on leave lacked the requisite authority under the limited partnership agreements that govern the Deloitte entities. Although he originally sought injunctive relief compelling Deloitte to permit him to return to work, he now seeks damages for wrongful disassociation.

The far narrower matter addressed by the Discovery Ruling concerned the adequacy of Deloitte's privilege log. On February 4, 2010, Klig served his first requests for production of documents. On March 8, Deloitte served its responses. Later that month, Deloitte began a rolling production of documents.

On June 8, 2010, Deloitte produced its privilege log. The 35-page document identified 348 privileged documents. All but 6 documents were withheld on grounds of attorney-client privilege. For 332 of those 342 documents, the log repeated verbatim under the heading "Description" one of five identical phrases:

> ***2** "Communication reflecting the legal advice of counsel regarding Klig matter."
>
> "Communication requesting the legal advice of counsel regarding Klig matter."
>
> "Redacted communication reflecting the legal advice of counsel regarding the Klig matter."
>
> "Redacted communication requesting the legal advice of counsel regarding the Klig matter."
>
> "Document subject of requested legal advice regarding Klig matter."

The descriptions for 97% of the purportedly privilege documents thus did not provide any document-specific description at all. Someone simply used a word processor's copy and paste functions to replicate the five phrases.

The five phrases duplicated information already provided by other columns on the log. The log contained a column entitled "Document Type," which described each document as an "Email," "Redacted email," "Email attachment," or "Redacted Document." The log contained a column entitled "Reason For Withholding," which stated "Attorney-Client Privilege" for each of the 342 documents. Delaware Rule of Evidence 502 defines the attorney-client privilege as extending to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."By designating the document as protected by the "Attorney-Client Privilege," Deloitte represented that the communication met this standard. So before ever getting to the "Description" column, a reviewer of the log knew that the entry purportedly concerned a communication made for the purpose of rendering legal services. For Deloitte to describe the entry as, for example, a "[c]ommunication reflecting the legal advice of counsel regarding Klig matter" offered no incremental information at all. As important, the description afforded Klig no way to assess the propriety of the assertion of privilege. And with the same five descriptions replicated 332 times, I am confident that was precisely Deloitte's intent.

By focusing on the 332 entries that mindlessly repeated one of the five phrases, I do not mean to imply that the other descriptions were any better. Two entries were described as "[d]raft communication prepared at the request of the Office of General Counsel."Two others were described as "[d]raft communication reflecting the legal advice of counsel regarding the Klig matter."Two more were described as "[d]raft communication reflecting the legal advice of counsel regarding Klig matter."One was "[d]ocument reflecting legal advice of counsel regarding Klig matter."Another was "[d]ocument prepared for Office of General Counsel."Another was "[d]ocument reflecting the legal advice of counsel regarding partner matters."The last was "[e]mail forwarding communication reflecting the legal advice of counsel regarding Klig matter."Although not technically identical to the rote five phrases, the remaining ten offered equally insubstantial fluff.

Deloitte's log did not even identify which of the people named on the log were attorneys. There was no "Esq.," asterisk, different type, or other marking that might signify attorney status. Deloitte did not bother to provide anyone's title or professional affiliation. Solely because the log was so deficient, the minor alternation in Deloitte's descriptions between the verbal phrase "reflecting the legal advice" and "requesting the legal advice" actually acquired some marginal informational content: it suggested whether or not the author of the communication was a lawyer. That is not a redeeming feature. It shows how little information the log provided.

***3** By letter dated June 21, 2010, Klig's counsel pointed out deficiencies in Deloitte's log and asked Deloitte's counsel to address them. By letter dated June 24, 2010, Deloitte's counsel refused.

Klig then moved to compel. He advanced a number of arguments, including that the log did not adequately describe the purportedly privileged documents.

Deloitte responded with a cross-motion. In its July 15, 2010, opposition to Klig's motion and opening brief in support of its own motion, Deloitte finally provided a list of the attorneys who appeared on its log. Deloitte claimed the list was provided "in response to Klig's request for a legend that identifies the persons listed on the log who are attorneys...." Defendants' Answering Brief in Opposition to Plaintiff's Motion to Compel and Opening Brief in Support of Defendants' Cross-Motion to Compel ("DAB") at 4. Deloitte did not explain why it decided to accede to Klig's request in its opposition, since just three weeks earlier Deloitte saw no need to supplement its log in any way.

During a hearing on August 6, 2010, I issued the Discovery Ruling. With respect to Deloitte's log, I ruled as follows:

> Now, the Deloitte log is also inadequate, although for different reasons. They at least listed documents on a document-by-document basis. But you don't just get to send over a list of documents and not say who people are. I know you guys then gave this list as Exhibit C, but that came too late. You also had these descriptions on here that are conclusory in the extreme. The vast majority of the documents on the log say communication reflecting the legal advice of counsel regarding Klig matter. Some of them say [”]communication requesting the legal advice of counsel regarding the Klig matter.[”] So from that, someone looking at this log can discern that one is a [question], the other is an answer. That's it. You can't tell whether this relates to Mr. Klig's resignation, Mr.-the partnership vote, you know, what his compensation would be, what the settlement would be. A description has to be sufficiently detailed so that someone can actually assess whether it makes sense to challenge the document. This is cutting and pasting the same description for every single entry.
>
> Now, I exaggerate a bit. There are a couple entries on here later on where there are some slight variations, such as [”]draft communication reflecting the legal advice of counsel regarding the Klig matter.[”]
>
> What this does is, it simply cuts and pastes one aspect of the attorney-client privilege standard-*i.e.*, [”]reflecting legal advice[”] again and again and again. It would not constitute anything remotely approaching waiver to say, for example, communication regarding potential partnership vote expelling Mr. Klig. Then at least someone reviewing this log would have some clue as to what this was talking about and what these entries were.
>
> ...
>
> Now, I know that in the past this Court has shown remarkable willingness to allow practitioners who provide an inadequate log to get a do-over and do it right. I think that's a terrible idea. I think that the privilege [law] out there is clear. A summer associate can find it in approximately an hour. There is no reward for doing a good privilege log. It's painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don't log a document, not if they come to the partner and say, "Really, this one shouldn't be logged."
>
> ***4** Because of those incentives, people have ample reason to be, again, overinclusive, not to describe documents meaningfully and hope that the other side won't challenge them. It's particularly a win-upside-no-downside scenario, if the only thing that happens when you then get challenged on

> it is you actually have to go back and do what you ... should have done in the first place. So I'm not going to play that game. An improperly asserted claim of privilege is no claim at all. It's waived. So as to those documents on the log, they're being ordered to be produced. So both sides, both logs, you blew it....

Discovery Ruling at 5-8. Later on August 6, I entered an order requiring that the inadequately described documents be produced.

II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of interlocutory appeals.Rule 42(b) provides: "No interlocutory appeal will be certified by the trial court or accepted by [the Supreme Court of Delaware] unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria...." The identified criteria include "[a]ny of the criteria applicable to certification of questions of law set forth in Rule 41."Supr. Ct. R. 42(b)(i). Under Rule 41(b), reasons to certify a question of law include:

> (i) *Original question of law.*The question of law is of first instance in this State;
>
> (ii) *Conflicting decisions.*The decisions of the trial courts are conflicting upon the question of law;
>
> (iii) *Unsettled question.*The question of law relates to the constitutionality, construction, or application of a statute of this State which has not been, but should be, settled by the Court.

Supr. Ct. R. 41(b).

A. Deloitte Mischaracterizes The Discovery Ruling.

Deloitte contends that certification is warranted because the Discovery Ruling conflicts with other trial court decisions. In making this argument, Deloitte emulates populist pundits from the extremes of the political spectrum who score points with their base by misleadingly reducing meaningful issues to simplistic sound bites. Deloitte thus re-casts the Discovery Order as follows:

> In its August 6, 2010 bench ruling, the Court created a new one-strike-and-you're-out rule for parties asserting privileges in the Court of Chancery: the party waives its attorney-client privilege if the Court perceives any aspect of a privilege log to be "inadequate." The Court also made clear in its Ruling that it will apply this harsh rule in all cases going forward-it will not provide counsel with a "do-over" on a privilege log. In all cases going forward, "[a]n improperly asserted claim of privilege is no claim at all. It's waived."

Defendant's Memorandum of Law in Support of Their Application for Certification of Interlocutory Appeal of the August 6, 2010 Ruling and Request for Stay Pending Appeal ("Application" or "App.") at 1. This is not a fair characterization of the Discovery Ruling.

***5** Nothing about the Discovery Ruling was "new." Admittedly I did not dilate at length on the law governing privilege logs. In small part this was because the law in this area is so readily established and easily available. In larger part it was because (at least prior to the current Application) both sides agreed on the operative legal principles. Deloitte's answering brief in opposition to Klig's motion to compel stated: “Deloitte agrees that a party must include information on its privilege log identifying ‘the subject [matter] of the communication sufficient to show why the privilege applies.’ “ DAB at 14 (quoting *Unisuper Ltd. v. News Corp.*, C.A. No. 1699-N, slip op. at 1-2 (Del. Ch. Mar. 9, 2006)). Deloitte also recognized that waiver was an appropriate remedy for an inadequate description; in pressing its own motion to compel against Klig, Deloitte stated: “As Klig's log fails to meet several of the basic requirements for establishing a privilege, the documents listed on the log should be produced.” DAB at 19 (citing *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *31-32 (Del.Ch. Aug.5, 2009)).

Nor did I announce a blanket rule that would apply “if the Court perceives *any aspect* of a privilege log to be ‘inadequate.’ “ DAB at 1 (emphasis added). Contrary to Deloitte's alarmist framing, I do not believe that ordering production of inadequately described documents is the appropriate remedy for every case. A party that has attempted in good faith to provide meaningful descriptions should not be penalized for falling short. An order requiring supplementation for the inadequate entries could well be appropriate. If the number of documents is limited, *in camera* review by the Court or a Special Master may be the most efficient solution.

This case, however, did not involve a party's good faith attempt to comply with Delaware law. Deloitte served a privilege log which contained virtually identical and content-less descriptions for 342 documents and which recited one of five rote descriptions for 332 of those entries (97% of its log). Deloitte made no effort to describe individual documents. Deloitte did not even bother to identify who on the log was an attorney. It takes conscious effort to render a log so devoid of content.

Deloitte's counsel knew how to prepare an adequate log. They are frequent and experienced practitioners before this Court. As discussed below, the requirements for a valid assertion of privilege have been stated repeatedly and consistently. In the *Unisuper* case, on which Deloitte itself relied, Deloitte's current counsel prepared the log that Chancellor Chandler deemed inadequate. The Chancellor wrote:

> The party asserting the protection of the attorney-client privilege has the burden of establishing its application. To meet this burden, defendants must include greater detail in their privilege log. Specifically, defendants must identify: (a) the date of the communication, (b) the parties to the communication (including their names and corporate positions), (c) the names of the attorneys who were parties to the communication, and (d) the

> subject [matter] of the communication sufficient to show why the privilege applies, as well as whether it pertains to the decision to reincorporate, the decision to adopt the board policy, or the decision to extend the board policy. With regard to this last requirement, the privilege log must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.

***6** *Id.* at 1-2 (internal quotations and footnotes omitted).

Measured by Deloitte's own authority, Deloitte's log fell woefully short. Deloitte did not provide anyone's corporate position, did not identify the parties who were attorneys, and did not provide "sufficient facts" in its rote and redundant descriptions. When Klig asked Deloitte to supplement its log, Deloitte refused. Deloitte's conduct indicates that its counsel intentionally produced chaff.

As I noted in my bench ruling, a practice of granting counsel a do-over even for this type of extreme behavior reinforces problematic incentives that already pervade the preparation of privilege logs. Lawyers know they rarely will be second-guessed by their clients for taking an expansive view of privilege and withholding borderline documents (I need not consider the potential for conscious concealment of evidence). Too frequently counsel default to a rule of invoking privilege whenever an attorney appears on a document. For there to be downside from this strategy, an adversary first must challenge the privilege calls. With all that needs doing in litigation, the opposing party may never do so. Or they may raise the issue but never follow up. Or they might follow up but not move to compel. And if the opposing party actually decides to file, the motion may be poorly pressed, and a cross-motion can muddy the waters and prompt a busy judge to declare a pox on both houses and deny all relief. If nothing else, every step takes time. With many a slip 'twixt cup and lip, the aggressive privilege call becomes second nature.

The privilege log serves as the fulcrum on which the adversary's decisions turn. The log is supposed to provide sufficient information to enable the adversary to assess the privilege claim and decide whether to mount a challenge. Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.

These incentives and the resulting practices undermine Delaware's "well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production."*Hoey v. Hawkins,* 332 A.2d 403, 405 (Del.1975) (quoting *Olszewski v. Howell*, 253 A.2d 77, 78 (Del.Super.1969)).“Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process. The rules of discovery demand no less.”*E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del.1999).

***7** The remedies imposed by the Court play a significant role in the producing party's calculus. If the only consequence of losing a motion to compel is an order requiring the party to prepare the log it should have prepared in the first place, then a Deloitte-style log offers considerable upside without meaningful downside. If parties know that a motion to compel can result in the immediate production of inadequately described documents, then the upfront incentives change. *Cf. Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F.Supp. 1429, 1443 (D.Del.1989) (refusing to allow a party to supplement its log entries in responding to a motion to compel; “Before compiling its withheld document list, plaintiff could easily have ascertained the standard of particularity expected by this Court and could have met that standard. Allowing it to do so now would encourage dilatory discovery practices.”).

Court of Chancery Rule 1 mandates that the rules be “construed and administered to secure the just, speedy and inexpensive determination of every proceeding.”Discovery is called that for a reason. It is not called “hide the ball.” By describing all of its documents with virtually identical and meaningless phrases, Deloitte deliberately deployed a strategy of obfuscation and delay. As I stated in the Discovery Ruling, it is a “terrible idea” to reward that type of conduct with a do-over. Every discovery dispute must be judged on its own facts and circumstances. The Discovery Ruling did not establish a rule of law for every case, but it should make clear the types of consequences that can flow from failing to comply with well-established obligations.

B. The Decisions Of The Trial Courts Do Not Conflict.

Deloitte's application turns on portraying the Discovery Ruling as conflicting with other decisions of the trial courts. *See* Supr. Ct. R. 41(b)(ii) & 42(b)(i). Deloitte takes issue with my statement that “[a]n improperly asserted claim of privilege is no claim at all.”App. at 1. Deloitte also disputes the principle that an inadequate description gives rise to waiver, which in turn depends on who has the burden to establish privilege. *Id.*

Although I did not provide a citation from the bench for my statement about the effect of an improperly asserted claim of privilege, the comment was not original. Chief Judge Latchum coined the phrase. *Int'l Paper v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D.Del.1974) (“An improperly asserted claim of privilege is no claim of privilege at all.”). Then Vice Chancellor, later Justice Hartnett adopted it in *Reese v. Klair*, 1985 WL 21127, at *5 (Del.Ch. Feb.20, 1985) (“An improperly asserted claim of privilege is no claim of privilege at all.”). A number of subsequent cases have embraced it. [1]

1 *E.g., M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *51 n. 262 (Del.Super.Apr.21, 2010); *Williams Natural Gas Co.*

v. Amoco Prod. Co., 1991 WL 236919, at *2 (Del.Super.Nov.8, 1991); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assocs., Inc.*, 1990 WL 161169, at *2 (Del.Super.Sept.26, 1990); *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 5197, at *2 (Del.Super.Jan.5, 1989).

Nor can I claim credit for placing the burden of proving that a privilege exists "on the party asserting the privilege."*Moyer v. Moyer*, 602 A.2d 68, 72 (Del.1992).[2] In meeting that burden,

2 *Accord Sokol Holdings*, 2009 WL 2501542, at *6 n. 28; *PharmAthen, Inc. v. SIGA Techs., Inc.*, 2009 WL 2031793, at *4 n. 13 (Del.Ch. July 10, 2009); *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *5 n. 43 (Del.Super.Feb.12, 2009); *SICPA Holdings, S.A. v. Optical Coating Lab., Inc.*, 1996 WL 636161, at *7 (Del.Ch. Oct.10, 1996); *Emerald Partners v. Berlin*, 1994 WL 125047, at * 1 (Del.Ch. Mar.30, 1994); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1118, 1122 (Del.Super.1992); *In re Fuqua Indus., Inc. S'holders Litig.*, 1992 WL 296448, at *3 (Del.Ch. Oct.8, 1992); *Deutsch v. Cogan*, 580 A.2d 100, 107 (Del.Ch.1990); *see generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.04 (2010).

> ***8** a bare allegation that information and documents are protected from discovery by the attorney-client privilege is insufficient without making more information available.... It is incumbent on one asserting the privilege to make a proper showing that each of the criteria [underlying the attorney-client privilege] exist[s].... A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.[3]

3 *Int'l Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 93-94 (D.Del.1974); *accord Sokol Holdings*, 2009 WL 2501542, at *8; *Deutsch*, 580 A.2d at 107; *Reese v. Klair*, 1985 WL 21127, at *5 (Del.Ch. Feb.20, 1985).

This standard requires that a party provide "sufficient *facts* as to bring the identified and described document within the narrow confines of the privilege."*Int'l Paper*, 63 F.R.D. at 94 (emphasis in original); *accord Unisuper*, C.A. No. 1699-N, at 2 (quoted *supra* at 9-10); *Reese*, 1985 WL 21127, at *5 ("The documents must be precisely enough described to bring them within the rule....").

I also did not invent the remedy of waiver as a consequence for an inadequate assertion of privilege. The leading treatise on practice in the Court of Chancery explains that waiver may result from an inadequate privilege log:

> The importance of providing an adequately descriptive and timely privilege log cannot be overlooked. *Although the Delaware courts have sometimes allowed a party the opportunity to supplement an insufficient privilege log, at least where that party appears to have endeavored in good faith to provide an adequate description of the privileged information in the first instance, the failure to properly claim a privilege or immunity or failure to raise a privilege or immunity in a timely manner can, in appropriate circumstances, result in a waiver of the privilege.*

Wolfe & Pittenger, § 7.04, at 7-51 to -52 (emphasis added). The Delaware state and federal courts have applied this principle. [4] So have other courts. [5]

4 *E.g., Willemijn Houdstermaatschaapi,* 707 F.Supp. at 1443 (ordering production of inadequately described documents); *Sokol Holdings,* 2009 WL 2501542, at *8 ("Sokol has waived the right to [assert privilege] by failing to update its privilege log to contain detailed enough descriptions....").

5 *E.g., Lee v. State Farm Mut. Auto. Ins. Co.,* 249 F.R.D. 662, 683 (D.Colo.2008) ("The failure to [adequately describe any information withheld as privileged] results in a waiver of the claims of privilege."); *Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P. C.,* 499 F.Supp.2d 475, 479 (S.D.N.Y.2007) ("Failure to furnish an adequate privilege log is grounds for rejecting a claim of attorney client privilege."); *Rambus, Inc. v. Infineon Techs. AG,* 220 F.R.D. 264, 274 (E.D.Va.2004) ("The finding of inadequacy [of descriptions in Rambus' privilege log], particularly in light of Rambus' earlier discovery and litigation misconduct, conceptually is sufficient to warrant a finding that the privileges have been waived."); *Bowne of New York City v. AmBase Corp.,* 150 F.R.D. 465, 474 (S.D.N.Y.1993) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected."), *quoted with approval in United States v. Constr. Prods. Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996) (affirming order requiring disclosure of allegedly privileged documents because of an inadequate privilege log).

In an effort to manufacture conflict, Deloitte points to *Cephalon, Inc. v. Johns Hopkins University*, 2009 WL 2714064 (Del.Ch. Aug.18, 2009). Deloitte mistakenly contends that *Cephalon* endorsed Deloitte's anemic and unchanging descriptions. To the contrary, Vice Chancellor Parsons deemed inadequate a privilege log that "fail[ed] to provide any explanation for the claim of privilege, other than a conclusory notation, such as 'Attorney-Client privilege.' " *Id.* at *3. The absence of any description whatsoever caused him to question the propriety of the privilege assertions. He therefore ordered the producing parties to "revise their privilege logs to provide additional information," *and* to "state as to each document that it contains confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client,' or provide a similar basis for the claimed privilege." *Id.* at *3 (quoting D.R.E. 502(b)(3)). He further required that "the supplemental privilege logs must be signed by an attorney in accordance with Rule 11." *Id.* Vice Chancellor Parsons made clear that "[t]o the extent Defendants are unable to comply with these directions, the documents involved must be produced." *Id.* In a footnote, he observed that "[n]o argument was made ... to the effect that Defendants had waived their claims of privilege and work product failing to supply a privilege log complying with applicable law." *Id.* at *3 n. 10.

***9** *Cephalon* did not suggest that a claim of privilege can be adequately supported by a description reciting, *verbatim,*"[the document] contains confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client.' " *Id.* at *3. Only a party searching for support for that unreasonable position could construe the decision in that fashion. What Vice Chancellor Parsons demanded was an explicit certification by counsel that each document met the requirements for privilege, including a representation that "it contain[ed] confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client,' or [that there was] a similar basis for the claimed privilege." *Id.* at

*3. Vice Chancellor Parsons gave no indication in Cephalon that he intended to depart from the pre-existing requirement that a party describe each document with sufficient facts to support the claim of privilege. He specifically noted that he did not consider the question of waiver because no party raised it. *Id.* at *3 n. 10.Rather than suggesting a hands-off endorsement of a canned phrase, *Cephalon* demonstrates this Court's meaningful oversight of the privilege log process.

Deloitte also argues that the Discovery Ruling was a "marked departure from the Superior Court's approach."App. at 12 (citing *Cont'l Cas. Co. v. Gen. Battery Corp.,* 1994 WL 682320 (Del.Super.Nov.16, 1994)). In making this argument, Deloitte misrepresents *Continental.*Although the Superior Court ordered the defendant to supplement its inadequate privilege log, the court noted that it was "unaware of, and the parties ha[d] not provided, any authority in which a court in this jurisdiction has ordered documents disclosed for which a claim of privilege has been made merely because a document description is insufficient."*Id.* at *2. The Court specifically stated that "[t]his ruling ... should not be construed as a reluctance to enforce such an order or a belief that it is beyond the Court's inherent powers in managing this litigation to make such a ruling."*Id.* at *2. The *Continental* court exercised its discretion to give the litigants another chance. The court did not hold that it *could not* order waiver.

Deloitte further contends that the Discovery Ruling conflicts with federal law, citing decisions that have required supplementation in lieu of waiver. As discussed, *supra,* waiver is an acceptable remedy. As the various decisions show, "[d]iscovery is subject to the exercise of this Court's sound discretion."*Emerald Partners v. Berlin,* 1994 WL 125047, at *2 (Del.Ch. Mar.30, 1994) (citing *Dann v. Chrysler Corp.,* 166 A.2d 431 (Del.Ch.1960)). How members of this Court or other courts previously have exercised their discretion under other circumstances does not establish a rule of law against waiver.

Contrary to Deloitte's sound bite, I did not announce a "one-strike-and-you'reout" rule that will apply in all future cases. Deloitte stood firm on a privilege log that, on its face, made no good faith attempt to provide document-by-document descriptions to support the privilege claims. Ordering that the inadequately described documents be produced fell within the scope of this Court's discretion. This was not a "sharp departure" from precedent or a "harsh new rule." The Discovery Ruling applied settled principles of law that needed no citation. Indeed, Deloitte and its counsel relied on those very same principles when briefing the cross-motions. It was only after they lost that the principles became frighteningly novel and unfamiliar. There is no conflict among the trial court decisions that merits interlocutory review.

C. The Discovery Ruling Did Not Determine A Substantial Issue Or Establish A Legal Right.

***10** Interlocutory review is not available unless an order determines a substantial issue and establishes a legal right. Supr. Ct. R. 42(b); *Gardinier, Inc. v. Cities Serv. Co.,* 349 A.2d 744, 745 (Del.1975). From these requirements springs the general rule that "a trial court's discovery rulings are not appealable under Rule 42, absent extraordinary circumstances."[6] Discovery is entrusted to the trial court's discretion, and the Supreme Court "will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of that discretion."*In re Rinehardt,* 575 A.2d 1079, 1082 (Del.1990); *accord Cebenka v. Upjohn Co.,* 559 A.2d 1219, 1226 (Del.1989)."Th[e] proscription against interlocutory review of discovery rulings 'does not change merely because the discovery/ disclosure order implicates the attorney-client privilege.' "[7]

6 *Crowhorn v. Nationwide Mut. Ins. Co.,* 804 A.2d 1065, 2002 WL 1924787, at * 1 (Del. Aug.14, 2002) (TABLE) (citing *Pepsico, Inc. v. Pepsi-Cola Bottling Co.,* 261 A.2d 520, 520-21 (Del.1969)); *accord McCann v. Emgee, Inc.,* 637 A.2d 827, 1993 WL 541922, at * 1 (Del. Dec.22, 1993) (TABLE); *American Centennial Ins. Co. v. Monsanto Co.,* 582 A.2d 934, 1990 WL 168260, at *1 (Del. Aug.10, 1990) (TABLE); *Huang v. Rochen,* 550 A.2d 35, 1988 WL 117518, at *1 (Del. Oct.27, 1988) (TABLE); *Levinson v. Conlon,* 385 A.2d 717, 720 (Del.1978); *Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.,* 301 A.2d 87, 87 (Del.1973); *Lummus Co. v. Air Prods. & Chems., Inc.,* 243 A.2d 718, 719 (Del.1968).

7 *Certain Underwriters at Lloyd's London v. Monsanto Co.,* 599 A.2d 412, 1991 WL 134471, at *1 (Del. June 7, 1991) (TABLE) (quoting *Rinehardt,* 575 A.2d at 1081);*accord Cordant Holdings Corp. v. Moore Bus. Forms, Inc.,* 682 A.2d 625, 1996 WL 415923, at *1 (Del. July 18, 1996) (TABLE); *Pepsico, Inc. v. Pepsi-Cola Bottling Co.,* 261 A.2d 520, 520-21 (Del.1969); *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.,* 1993 WL 19587, at *1-2 (Del.Super.Jan.25, 1993).

Deloitte acknowledges these general rules, but argues that this case is different because of my supposed "announced intent to apply a one-strike-and-you're-out rule in all future privilege disputes."App. at 9. As discussed above, this mischaracterizes my ruling. I did not announce a "broadly applicable" rule. My ruling rested on the facts of this case: Deloitte made no good faith attempt to describe documents sufficiently to allow an examination of the basis for the claim of privilege, and therefore they must disclose those documents. Like other discretionary discovery decisions, the Discovery Ruling did not determine a substantial issue or establish a legal right.

In an effort to suggest that the Discovery Ruling concerns a substantial issue, Deloitte cries wolf: "No longer can parties in the Delaware courts-or in-house counsel in Delaware corporations around the world-feel secure that their discussions with counsel will remain confidential."App. at 10. The Discovery Ruling does not alter in any way the requirements for the attorney-client privilege, which is governed by Delaware Rule of Evidence 502. It has always been the case that any claim of privilege, no matter how well-founded, must be adequately described. Here, Deloitte's counsel produced a privilege log that facially failed the standards set out in the very authorities on which they relied. It was this tactical decision that led to the Discovery Ruling. Applying settled law on waiver does not alter the underlying scope of the attorney-client privilege, or create any uncertainty for future litigants.

The Discovery Ruling therefore does not establish a legal right. It did not determine a substantial issue. Separate and independent of the lack of any conflict among discretionary trial court determinations, these failings provide alternative bases for denying interlocutory review.

D. The Defendants' Motion For A Stay Pending Appeal

In addition to seeking interlocutory review, Deloitte for a stay of the Discovery Ruling pending appeal. Under Court of Chancery Rule 62(d), stays pending appeal are governed by Delaware Supreme Court Rule 32(a) and Article IV, Section 24 of the Constitution of the State of Delaware. Ct. Ch. R. 62(d). Under Supreme Court Rule 32(a), "[a] stay ... pending appeal may be granted or denied in the discretion of the trial court."In deciding whether to exercise its discretion to grant a stay, the Court is required:

> ***11** (1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted.

Kirpat, 741 A.2d at 357. The *Kirpat* factors are not a checklist; they are balanced with "all of the equities involved in the case together."*Id.* at 358.

Kirpat's "likelihood of success" factor requires only that the appellant have "presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation."*Id.* (internal quotation omitted). Because my discretionary ruling cohered with prior precedent and the principles Deloitte itself embraced at the time, there is no fair ground for further litigation. This factor weighs against a stay.

The threat of irreparable harm to Deloitte points in a different direction. Once privileged documents are produced and reviewed, the opposing party cannot later erase all memory of their contents. Where, as here, the consequences of a ruling "cannot be undone," a stay is more likely to be warranted. *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.,* 2006 WL 2521434, at *2 (Del.Ch. Aug.9, 2006).

There is some threat of harm to Klig. As long as a stay remains in place, Klig will not be able to review the documents or use them in discovery as the case moves forward. Granting a stay therefore risks furthering Deloitte's strategy of defense-by-attrition. At the same time, the case is not expedited, the parties have not pressed forward rapidly, and no trial date has been set. The harm to Klig appears limited.

The public interest is neither harmed nor helped by a stay. There is a substantial public interest in the protection of the attorney-client privilege, but that interest is balanced by equally substantial interests in the expeditious resolution of disputes and the deterrence of discovery misconduct. The public interest stands in equipoise.

Weighing these factors, I believe that the appropriate course is to grant a limited stay sufficient to enable Deloitte to pursue its application for certification of an interlocutory appeal with the Delaware Supreme Court. If the senior tribunal sees merit in the application, then it will be in a position to grant a stay. If the justices believe a shorter stay is warranted to allow them to consider the application, they can take that step. This Court's stay will therefore remain in effect for another 20 calendar days to facilitate appellate review.

III. CONCLUSION

For these reasons, I decline to certify the Discovery Ruling for interlocutory appeal. The temporary stay I ordered on August 17, 2010, shall remain in place for an additional 20 calendar days. **IT IS SO ORDERED.**

End of Document

EXHIBIT C

From: "Schoell, Joseph C." <Joseph.Schoell@dbr.com>
Subject: 14-193 - Joint Applicants' objections
Date: August 14, 2014 9:19:17 AM EDT
To: "Orr, Lindsay B." <lindsay.orr@dbr.com>, James Geddes <jamesgeddes@mac.com>
Cc: "McGonigle, Thomas P." <Thomas.McGonigle@dbr.com>, "todd.goodman@pepcoholdings.com Goodman" <todd.goodman@pepcoholdings.com>, "Julie M (DOS) Donoghue" <Jo.Donoghue@state.de.us>

Jim/Jo –

Todd Goodman and I tried to reach Jim by pone this morning. We just wanted to clarify the Joint Applicants' position with respect to our objections on PSC-FN-58 and PSC-PI-187. We are in the process of pulling together redacted documents, as summarized below and accordingly, we do not think a motion to compel is necessary or appropriate under the scheduling order.

PSC-FN-58 - Hart-Scott Rodino: We are in the process of redacting confidential information that is not PHI's or Exelon's to waive, for example, the identity of other bidders. As such, it is no longer a "7-day objection" under the scheduling order, meaning that the HSR material will be produced with the other responses to data requests.

PSC-PI-187 - Documents Filed as Confidential in the Exelon/PSEG Merger Docket in NJ: Exelon is in the process of obtaining the documents that it has the ability to produce and is also in the process of seeking permission from PSEG concerning PSEG's documents. As such, this issue is also no longer a "7-day objection" under the scheduling order, meaning that the material that can be produced by Exelon will be produced with the other responses to data requests.

Please let me know if you have any questions concerning the Joint Applicants' position or if you would like to discuss this further.

Thanks.
Joe

Joseph C. Schoell
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Tel: (302) 467-4245

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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, INC. EXELON CORPORATION, PEPCO HOLDINGS, INC. PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC, AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *DEL. C.* §§ 215 AND 1016 (FILED JUNE 18, 2014)	)	PSC DOCKET NO. 14-193

ORDER NO. 8XXX

AND NOW, this 22nd day of August, 2014, the duly-appointed Senior Hearing Examiner for this docket determines and orders the following:

1. Pursuant to ¶2 of Order No. 8581 (July 8, 2014), the Commission designated me as the hearing examiner for this docket and directed that I monitor and resolve any discovery disputes among the parties. At this time, it is apparent that the parties have a discovery dispute that I must resolve.

2. On July 31, 2014, the Public Service Commission Staff ("Staff") timely served discovery on Delmarva Power & Light Company ("Delmarva"), Pepco Holdings, Inc. ("PHI"), Exelon Corporation ("Exelon"), Exelon Energy Delivery Company, LLC ("Exelon"), Purple Acquisition Corporation ("Merger Sub"), and Special Purpose Entity, LLC ("SPE") (collectively, the "Joint Applicants").

3. On August 7, 2014, the Joint Applicants timely objected in writing to three of Staff's discovery questions, namely PSC-FN-18,[1] PSC-FN-58,[2] and PSC-PI-187.[3]

[1] PSC-FN-18 provides as follows: "Ring Fencing - Please provide all communications between Exelon and PHI concerning potential ring fencing measures."

[2] PSC-FN-58 provides as follows: "Corporate Governance - Please provide the Hart-Scott-Rodino filings of PHI and Exelon once available."

The Joint Applicants' objection states: (1) in reference to PSC-FN-18, that all communications concerning ring fencing between Exelon and PHI were between counsel for the Joint Applicants or counsel and their clients; (2) in reference to PSC-FN-58, that the requested material is protected from disclosure pursuant to 15 U.S.C. §18a(h); and (3) in reference to PSC-PI-187, that the material is confidential to a third party ("PSEG") that is not a party to this proceeding and, therefore, the Joint Applicants may not waive its right to confidentiality.

6. On August 15, 2014, after the parties tried to resolve the discovery dispute among themselves, Staff timely served a Motion to Compel Production of Discovery Responses. See the attached **Exhibit "A."** Staff argued the following: (a) The Joint Applicants' objections on the basis of attorney-client privilege and the common interest doctrine are unsupported by their deficient privilege log and should be rejected; (b) the common interest doctrine offers no protection for the withheld documents; (c) 15 U.S.C. §18a(h) does not apply to a non-governmental filing party in a state administrative proceeding, and the Joint Applicants' refusal to disclose the filing is therefore inappropriate; and (d) the Joint Applicants failed to explain why they should not produce documents related to PSEG's testimony in the New Jersey case, particularly in light of Staff's willingness to agree to a confidentiality stipulation.

NOW, THEREFORE, IT IS ORDERED:

7. I have read the privilege log produced by the Joint Applicants regarding the alleged attorney-client privilege and Staff's Motion to Compel. I find that the

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[3] PSC-PI-187 provides as follows: "Merger Savings and Allocations - Please produce a copy of the confidential version of all testimony and exhibits addressing merger savings (including the cost-benefit analysis) that was sponsored by Exelon and/or PSEG witnesses in the proposed merger proceedings before the New Jersey BPU in Docket No. EM05020106."

privilege log is inadequate and fails to show why such documents should not be produced. Based on the case law cited by Staff, I rule that the Joint Applicants must produce all documents requested by Staff as set forth in PSC-FN-18.

8. Moreover, I rule that the Joint Applicants must produce to Staff the documents requested in PSC-FN-58. My conclusion is based on the legislative history of 18 U.S.C. §18a(h) and the case law supported by Staff. I find that 18 U.S.C. §18a(h) was not meant to prohibit a non-governmental entity (such as the Joint Applicants) from producing in an administrative proceeding a Hart-Scott-Rodino filing, especially given that the parties requesting such documents have signed confidentiality agreements or are bound by state law from disclosing the contents of such documents.

9. Finally, I rule that the Joint Applicants must produce to Staff the documents requested in PSC-PH-187. I find that Staff and its consultants are bound by the confidentiality documents that they have signed or by state law which prohibits disclosure of confidential documents such as the one requested by Staff in this discovery request.

Respectfully Submitted,

Mark Lawrence, Senior Hearing Examiner

cc: Service list – 14-193 – as of August 22, 2014

<u>EXHIBIT "A"</u>

PUBLIC SERVICE COMMISSION STAFF'S MOTION TO COMPEL PRODUCTION OF DISCOVERY RESPONSES

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, INC. EXELON CORPORATION, PEPCO HOLDINGS, INC. PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC, AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *DEL. C.* §§ 215 AND 1016 (FILED JUNE 18, 2014)	))))))))	PSC DOCKET NO. 14-193

CERTIFICATE OF SERVICE

I, James Geddes, hereby certify that on August 15, 2014, I caused a copy of the attached **PUBLIC SERVICE COMMISSION STAFF'S MOTION TO COMPEL PRODUCTION OF DISCOVERY RESPONSES** to be served upon all persons on the attached service list by electronic mail and otherwise in the manner set forth thereon.

/s/ James McC. Geddes

James McC. Geddes (#690)
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jamesgeddes@mac.com

Dated: August 15, 2014

Attachments: Service list for 14-193 – as of August 15, 2014
Proposed order to compel discovery responses – 14-193